Joceline Tan Poh Choo & Ors v V Muthusamy

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–4–2004 (P)
RICHARD MALANJUM CJ (SABAH & SARAWAK), ALAUDDIN, ABDUL AZIZ MOHAMAD, HASHIM YUSOFF, AZMEL, FCJJ
14 SEPTEMBER 2007

Civil Procedure — Judgment — Federal Court — Motion to review and set aside Federal Court decision — Ultimate decision going against tenor of whole remainder of judgment — Whether rehearing of appeal was necessary — Rules of the Federal Court 1995 r 137

The defendants' only defence to the plaintiff's defamation action was that the newspaper report was absolutely privileged by virtue of s 11(1) of the Defamation Act 1959. The trial judge had stated that the defence of absolute privilege under s 11 failed because the report failed to satisfy the requirement of the section that it be fair, accurate and contemporaneous, ie failed to qualify as to quality. The High Court awarded the plaintiff RM300,000 as compensatory damages, RM50,000 as aggravated damages, and interest at 8% per annum from the date of judgment. The defendants appealed to the Court of Appeal against the finding of liability and as regards quantum. The plaintiff appealed as regards quantum and interest. The Court of Appeal's concluded that the publication by the defendants of part of the amended statement of claim which had not been read out in open court was not within the scope of the protection given by s 11(1) of the Act. The Court of Appeal therefore affirmed the High Court's finding as regards liability. The affirmation was made on the basis that the High Court's finding was that the report did not qualify as to its subject for absolute privilege. The Court of Appeal did not come to any conclusion as regards the quality of the report, ie whether it was a fair and accurate report, which the trial judge had found was not. With their conclusion as to the subject of the report, it was not necessary for the question of liability for the Court of Appeal to arrive at a conclusion as to the quality of the report. But the High Court's finding as to the quality of the report, that it was not a fair and accurate report, remained intact and undisturbed at the Court of Appeal stage. The Court of Appeal then dismissed the defendants' appeal as regards liability but allowed their appeal as regards quantum by reducing compensatory damages from RM300,000 to RM100,000 and setting aside the award of aggravated damages of RM50,000. The plaintiff's appeal as regards quantum was consequently dismissed. On 3 March 2007 this court dismissed the plaintiff's application for leave to appeal to it but allowed the defendants' application for leave to appeal to it on the following question: 'Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should be read out in the course of the proceedings before publication can be made of the pleadings'. At Federal Court, Abdul Malek Ahmad PCA placed importance on the quality of a report, ie on its being fair, accurate and contemporaneous. In para 19 Abdul Malek Ahmad PCA spoke of the concurrent

findings of fact made by the High Court and the Court of Appeal and of there being 'no room for this court to reverse the concurrent findings of fact'. A

Then, though the answer to the question as to the subject of the report was decisive of the appeal and the quality of the report was not important and there had been no finding of fact that the report was not a fair and accurate report, the judgment concluded with the words: 'The appeal is accordingly allowed and the order of the Court of Appeal is set aside'. That conclusion was against the tenor of the whole judgment and particularly conflicted with the conclusion in the last sentence of para 19. At 4pm of the day on which the judgment was read out, the deputy registrar telephoned the plaintiff, who had acted in person in the appeal in this court, and informed him that Abdul Malek Ahmad PCA had made two amendments to the judgment that had been read out. One amendment was the deletion of that last sentence of para 19. The other amendment was to include in para 36 the setting aside of the orders of the High Court. B C

By this motion the plaintiff/respondent relying on r 137 of the Rules of the Federal Court 1995 applied to have reviewed and set aside the Federal Court decision: (1) which granted the defendants/appellants leave to appeal to this court; and (2) which allowed the appeal of the appellants. The defendants agreed, as the plaintiff contended, that this court has inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court to the extent even of reviewing its own decisions, but the defendants contended that there had been no injustice or abuse of process involved in either of those two decisions. D E

Held, allowing the motion and ordering that the defendants' appeal be reheard by another panel of this court constituted for the purpose: F

(1) The amendment did not affect the ultimate decision in para 36 that the appeal be allowed. The deletion of the last sentence of para 19 was undoubtedly to remove the conclusion in it that conflicted with the ultimate decision. The deletion of that sentence, however, still left the ultimate decision going against the tenor of the whole remainder of the judgment, with its emphasis on how important it was that the report be a fair, accurate and contemporaneous report, particularly the recognition in para 19 that the High Court and the Court of Appeal had made concurrent findings of fact which could not be reversed and which, must have been intended to refer to the finding, made by the High Court only and undisturbed by the Court of Appeal, that the report was not a fair and accurate report (see para 26). G H

(2) The plaintiff perceived that the High Court and the Court of Appeal had made concurrent findings that the report was not a fair and accurate report, was therefore justified in complaining that when the learned PCA allowed the appeal with costs, it was contradictory with his earlier findings that the report was not a fair and accurate report. The question framed by court had no relevance with the concurrent finding of the High Court and the Court of Appeal (see para 27). I

(3) The fact is that the High Court did make a finding that the report was not a fair and accurate report, which finding remained intact and undisturbed at the Court of Appeal stage. If the appeal panel of this court had found, as apparently they did, that the High Court and the Court of Appeal had made concurrent findings that the report was not a fair and accurate report which could not be disturbed, it should follow that the appeal be dismissed, and it is manifestly unjust that the appeal was allowed merely on the finding in favour of the defendants as to the subject of the report (see para 28).

(4) The circumstances of this case warrant a rehearing of the appeal for the purpose of reconsidering whether there had been concurrent findings by the High Court and the Court of Appeal that the report was not a fair and accurate report, or whether there had been a finding by the High Court only to that effect which, however, remained intact and undisturbed at the Court of Appeal stage, and if there had been such concurrent findings, or such a finding by the High Court only, what their effect was on the appeal. This conclusion was the outcome of the views that the court have formed of the judgments of the High Court, of the Court of Appeal and of this court in this case. For the rehearing to be meaningful, it is important that it be conducted on the basis that the views expressed in this judgment are not the ultimate views of this court. The ultimate views would be those of the panel rehearing the appeal, formed after hearing the submissions or arguments of the parties (see para 29).

(5) A review of the decision of this court revealed that the decision was, on the face of it, an unjust decision. Apart from its being the course that the plaintiff himself sought, a rehearing of the appeal was necessary as the outcome of the review, so that there may be made, by submission and argument, an examination — one that is fuller than what has taken place on the hearing of this motion — of the area from which the court perceive the apparent injustice to have arisen, and so that, according to the ultimate finding of this court on such examination, a decision will be made on the appeal, whether it be for or against the plaintiff, that will not appear to be unjust (see para 30).

[Bahasa Malaysia summary

Satu-satunya pembelaan defendan kepada tindakan fitnah plaintif adalah laporan surat khabar adalah secara mutlaknya dilindungi oleh s 11(1) Akta Fitnah 1959. Hakim bicara telah menyatakan bahawa pembelaan berkenaan dengan keistimewaan mutlak di bawah s 11 adalah gagal kerana laporan tersebut gagal memenuhi syarat seksyen tersebut bahawa ianya perlu adil, tepat dan semasa iaitu gagal untuk melepasi kualiti. Mahkamah Tinggi mengawardkan plaintif RM300,000 sebagai pampas an gantirugi, RM50,000 sebagai gantirugi teruk dan faedah pada kadar 8% setahun daripada tarikh penghakiman. Plaintif-plaintif telah merayu ke Mahkamah Rayuan terhadap keputusan liabiliti dan berkenaan dengan kuantum. Plaintif merayu berkenaan dengan kuantum dan faedah. Mahkamah Rayuan menyimpulkan bahawa penerbitan oleh defendan berkenaan dengan sebahagian pernyataan tuntutan terpinda yang mana tidak pernah dibaca dalam mahkamah terbuka adalah di dalam skop perlindungan yang diberikan oleh s 11(1) Akta tersebut. Mahkamah Rayuan oleh itu mengesahkan keputusan Mahkamah Tinggi berkenaan dengan liabiliti.

Pengesahan telah dibuat atas dasar bahawa keputusan Mahkamah Tinggi bahawa laporan tidak melepasi berkenaan dengannya tertakluk kepada keistimewaan mutlak. Mahkamah Rayuan tidak membuat apa-apa kesimpulan berkenaan dengan kualiti laporan iaitu sama ada ianya adalah adil dan laporan yang tepat, yang mana hakim bicara telah mendapatinya adalah tidak. Dengan kesimpulan mereka berkenaan dengan subjek laporan, ianya adalah tidak penting untuk persoalan liability bagi Mahkamah Rayuan sampai kepada kesimpulan berkenaan dengan kualiti laporan. Tetapi keputusan Mahkamah Tinggi berkenaan dengan kualiti laporan bahawa ianya adalah laporan yang tidak adil dan tepat, kekal dan tidak disentuh di peringkat Mahkamah Rayuan. Mahkamah Rayuan kemudiannya menolak rayuan defendan berkenaan dengan liability tetapi membenarkan rayuan mereka berkenaan dengan kuantum dengan mengurangkan pampasan daripada RM300,000 kepada RM100,000 dan mengenepikan award gantirugi teruk yang berjumlah RM50,000. Rayuan plaintif berkenaan dengan kuantum kemudiannya ditolak. Pada 3 Mac 2007 mahkamah ini menolak permohonan plaintif untuk kebenaran merayu tetapi telah membenarkan permohonan defendan untuk kebenaran merayu atas persoalan berikut: sama ada satu laporan yang adil dan tepat berkenaan dengan prosiding yang didengar secara terbuka di Mahkamah Tinggi mungkin termasuk petikan pliding dan jika benar, sama ada pliding perlu dibacakan berkaitan dengan prosiding sebelum penerbitan boleh dibuat daripada pliding'. Di Mahkamah Persekutuan Abdul Malek Ahmad PMR meletakkan kepentingan di atas kualiti laporan, iaitu ianya hendaklah adil, tepat dan mengikut keadaan semasa. Di perenggan 19 Abdul Malek Ahmad PMR telah menyatakan berkenaan dengan keselarasan dapatan fakta yang telah dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan dan terdapatnya 'tiada ruang untuk mahkamah ini untuk mengakaskan keselarasan dapatan fakta'.

Oleh itu, walaupun jawapan kepada persoalan berkenaan dengan subjek laporan adalah rayuan yang muktamad dan kualiti laporan adalah tidak penting dan tidak terdapatnya dapatan fakta bahawa laporan adalah tidak adil dan tepat, penghakiman disimpulkan dengan ayat: 'Rayuan dengan sewajarnya dibenarkan dan perintah Mahkamah Rayuan diketepikan'. Kesimpulan tersebut adalah bertentangan dengan maksud keseluruhan penghakiman dan terutamanya percanggahan dengan kesimpulan di ayat yang terakhir di perenggan 19. Pada pukul 4 petang hari yang sama penghakiman telah dibacakan, timbalan pendaftar telah menelefon plaintif yang mana bertindak secara bersendiri dalam rayuan di mahkamah ini, dan memberitahunya bahawa Abdul Malek Ahmad PMR telah membuat dua pindaan kepada penghakiman yang telah dibacakan. Pindaan pertama adalah pemotongan ayat terakhir perenggan 19. Pindaan yang satu lagi adalah memasukkan di perenggan 36 berkenaan dengan pengenepian perintah Mahkamah Tinggi.

Melalui usul ini plaintif/responden bersandarkan kepada peraturan 137 Kaedah-Kaedah Mahkamah Persekutuan 1995, memohon untuk kajian semulan dan mengenepikan keputusan Mahkamah Persekutuan; (1) yang membenarkan defendan/perayu kebenaran untuk merayu ke mahkamah ini; dan (2) yang membenarkan rayuan perayu-perayu. Defendan-defendan bersetuju, seperti mana yang ditegaskan oleh plaintif bahawa mahkamah ini mempunyai kuasa sedia ada untuk mendengar apa jua permohonan atau untuk membuat apa jua perintah yang mana perlu untuk mencegah ketidakadilan atau untuk mencegah penyalahgunaan proses mahkamah sehinggakan kepada kajian semula keputusannya sendiri, tetapi

A defendan-defendan menegaskan bahawa tidak terdapatnya ketidakadilan atau penyalahgunaan proses terlibat di dalam kedua-dua keputusan tersebut.

Diputuskan, membenarkan usul dan memerintahkan bahawa rayuan
B defendan-defendan didengar semula oleh panel mahkamah ini yang lain yang dibentuk bagi tujuan tersebut:

(1) Pindaan tidak memberikan kesan kepada keputusan utama di perenggan 36 yang telah membenarkan rayuan. Pemotongan ayat terakhir di perenggan 19 adalah tidak diragui untuk membuang kesimpulan di dalamnya yang
C bercanggah dengan keputusan utama. Pemotongan ayat tersebut, walau bagaimanapun, tetap meninggalkan keputusan utama bertentangan dengan maksud keseluruhan baki penghakiman, dengan penekanannya ke atas bagaimana pentingnya bahawa laporan adalah laporan yang adil, tepat dan mengikut keadaan semasa, terutamanya pengiktirafan di perenggan 19 bahawa
D Mahkamah Tinggi dan Mahkamah Rayuan telah membuat keputusan bersama fakta yang mana tidak boleh diakas dan yang mana mestilah dikehendaki untuk merujuk hanya kepada keputusan yang telah dibuat oleh Mahkamah Tinggi dan tidak diganggu oleh Mahkamah Rayuan bahawa laporan tersebut adalah laporan yang tidak adil dan tepat (lihat perenggan 26).

E (2) Plaintif dapat melihat bahawa Mahkamah Tinggi dan Mahkamah Rayuan telah membuat keputusan bersama bahawa laporan adalah tidak adil dan tepat oleh itu menjustifikasikan dalam pengaduan bahawa PMR yang bijaksana telah membenarkan rayuan dengan kos, ianya adalah bertentangan dengan dapatan awalnya bahawa laporan adalah tidak adil dan tepat. Persoalan yang dirangka oleh mahkamah tidak berkaitan dengan keputusan bersama Mahkamah Tinggi
F dan Mahkamah Rayuan (lihat perenggan 27).

(3) Faktanya adalah bahawa Mahkamah Tinggi ada membuat keputusan bahawa laporan adalah satu yang tidak adil dan tepat, yang mana keputusan adalah kekal tidak terjejas dan tidak diganggu di peringkat Mahkamah Rayuan. Jika panel rayuan mahkamah ini mendapati, yang mana dengan jelasnya
G mereka telah lakukan bahawa Mahkamah Tinggi dan Mahkamah Rayuan telah membuat keputusan bersama bahawa laporan adalah bukannya satu laporan yang adil dan tepat yang tidak boleh diganggu, ianya diikuti bahawa rayuan ditolak dan ianya secara jelas tidak adil bahawa rayuan dibenarkan hanya atas keputusan berpihak kepada defendan-defendan berkenaan dengan subjek
H laporan (lihat perenggan 28).

(4) Keadaan kes ini memerlukan satu pendengan semula rayuan bagi tujuan untuk mempertimbangkan semula sama ada terdapatnya keputusan bersama oleh Mahkamah Tinggi dan Mahkamah Rayuan bahawa laporan adalah tidak adil dan tepat atau sama ada terdapatnya keputusan hanya oleh Mahkamah Tinggi
I kepada keadaan tersebut, tetapi kekal tidak terjejas dan tidak diganggu di peringkat Mahkamah Rayuan, dan jika terdapatnya keputusan bersama atau keputusan tersebut hanya oleh Mahkamah Tinggi, apa kesannya terhadap rayuan. Kesimpulan ini adalah hasil daripada pandangan bahawa mahkamah telah membentuk penghakiman Mahkamah Tinggi, Mahkamah Rayuan dan mahkamah ini dalam kes ini. Untuk pendengaran semula menjadi bermakna,

adalah penting bahawa ianya di jalankan atas dasar bahawa pandangan yang dikeluarkan dalam penghakiman ini adalah bukannya pandangan utama mahkamah ini. Pandangan utama adalah kepada panel pendengaran semula rayuan yang dibentuk selepas mendengar hujahan atau pernyataan pihak-pihak (lihat perenggan 29).

(5) Kajian semula keputusan mahkamah ini memperlihatkan bahawa keputusan adalah pada permukaannya satu keputusan yang tidak adil, sebahagian daripadanya menyebabkan bahawa plaintif sendiri memohon satu pendengan semula rayuan adalah perlu yang mana hasil daripada kajian semula, yang boleh dilakukan melalui penghujahan dan pernyataan, satu pemeriksaan — satu daripadanya adalah lebih baik daripada apa yang berlaku ketika pendengaran usul ini — daripada bahagian di mana mahkamah melihat ketidakadilan yang jelas telah timbul dan dengan itu, berdasarkan kepada keputusan utama mahkamah ini ke atas pemeriksaan tersebut, satu keputusan akan dibuat ketika rayuan, sama ada berpihak atau menentang plaintif ianya akan tidak kelihatan sebagai tidak adil (lihat perenggan 30).]

Notes

For a case on Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3900.

Cases referred to

Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517 (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513 (refd)

Legislation referred to

Defamation Act 1959 s 11(1)
Rules of the Federal Court 1995 r 137

JA Yeoh (JJ Chan with him) (Shearn Delamore & Co) for the appellants.
Darshan Singh (CV Prabhakaran with him) (V Muthusamy & Associates) for the respondent.

Abdul Aziz Mohamad FCJ (delivering judgment of the court):

[1] By this motion the respondent, who is an advocate and solicitor, relying on rule 137 of the Rules of the Federal Court 1995, applies to have reviewed and set aside a decision of this court of 3 March 2004 and another of 13 May 2005. By the latter decision this court allowed the appeal of the appellants against the decision of the Court of Appeal dismissing the appellants' appeal against the decision of the High Court in favour of the respondent in a defamation action brought by the respondent against the appellants. The earlier decision was a decision granting the appellants leave to appeal to this court. In para 13 of their written submission the appellants agree, as the respondent contends, that, as reflected in rule 137 and as this court held in *Chan Yock Cher v Chan Teong Peng* [2005] 1 MLJ 101, this court has inherent powers, in the words of the rule, 'to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court'

to the extent even of reviewing its own decisions, but the appellants contend that there has been no injustice or abuse of process involved in either of those two decisions. To avoid confusion, from now on we will refer to the respondent as 'the plaintiff' and the appellants as 'the defendants' and the references to them in extracts from the judgments at the appeal stages of this case will be modified accordingly.

[2] At the outset, we have to say that the question of reviewing the leave decision of 3 March 2004 does not merit consideration and will not be gone into. As for the appeal decision of 13 May 2005 the plaintiff has advanced various grounds to justify its review and setting aside but most of them do not merit consideration and will not be gone into. If the plaintiff succeeds in showing a case for a review of the appeal decision, he wants the defendants' appeal to this court to be reheard by a differently constituted panel of this court.

[3] The plaintiff's defamation action arose out of an earlier action in the High Court at Penang in which one Paramasivam a/l Varatharajoo sued one Varlivell alias Vadiveloo s/o Varatharajoo, as the first defendant, and the plaintiff, as the second defendant, for various reliefs in connection with the transfer of Paramasivam's land. 11 September 1991 was the first day of the trial of this earlier action, which will be referred to as 'Paramasivam's action'. Next day, 12 September, there appeared in the defendants' newspaper, The New Straits Times, relative to the first day of the trial, a report containing statements which became the subject of the plaintiff's defamation action. The statements may be summarized as a claim by Paramasivam that the plaintiff, a lawyer, whose photograph was published with the report, and Varlivell, a trader, had conspired to cheat Paramasivam, an illiterate man and the plaintiff's client, by allowing Paramasivam's land to be transferred to a businessman without his knowledge and permission. The report bore a heading in bold letters: *Lawyer and trader conspired to cheat me, claims driver*.

[4] The defendants' only defence was that the report was absolutely privileged by virtue of s 11(1) of the Defamation Act 1959, which, as far as material for the present motion, provides as follows:

> (1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia … shall be absolutely privileged …

[5] To be qualified for absolute privilege under s 11(1), a report has to be, in the first place, the report of proceedings publicly heard before a competent court. That is the subject of the report. In the second place, it has to be fair and accurate and contemporaneous. That is the quality of the report. If it is not fair or not accurate or not contemporaneous, it fails as to quality and does not qualify for absolute privilege. If the report is not a report of proceedings publicly heard before a competent court, it fails as to subject and does not qualify for absolute privilege and the question as to quality, whether it is fair, accurate or contemporaneous, does not arise and is irrelevant, or it does not matter whether it is or is not fair, accurate or

contemporaneous. The question as to quality arises and is relevant or matters only if the report is the report of proceedings publicly heard before a competent court, that is, it qualifies as to subject.

THE HIGH COURT JUDGMENT

[6] To appreciate the plaintiff's grounds for review that we consider merit consideration, it is necessary to examine the findings made respectively by the High Court, the Court of Appeal and this court. At the High Court, it would appear, from pp 12 and 14 of the grounds of judgment of Wan Adnan Mohamad J (now JCA), that the defendants, to justify their contention that the report was 'of proceedings publicly heard' before the High Court, attempted to show, through the testimony of the first defendant (SD1), who was the reporter, that the report was of matters that came out in open court in the opening speech of Paramasivam's counsel, Mr Karpal Singh (SD4), and through the trial judge's reference to the contents of the statement of claim.

[7] At p 13, Wan Adnan Mohamad J referred to the reporter's admission that her 'summary' was based on the statement of claim given to her by Paramasivam's counsel. At p 14 he said that the reporter's evidence that the trial judge in Paramasivam's action referred to the statement of claim was unfounded and that he could not accept that there was an opening speech by Paramasivam's counsel. One might be inclined to conclude from this that the learned trial judge was going to find or was impliedly making a finding that the report was not of matters that came out in open court on 11 September 1991 and therefore, for the purposes of s 11(1), was not 'of proceedings publicly heard' before the High Court. But at p 19 he asked the question whether what was reported was based on what happened in the proceedings ('adakah apa yang direport tersebut berdasarkan apa yang berlaku dalam prosiding?'). The answer that immediately followed was as follows:

> … Dari keterangan yang ada jelas bahawa apa yang disiar dalam C1 adalah sebahagian sahaja. Ini diakui sendiri oleh defendan 1 yang dia buat report berasas apa yang kononnya dikata oleh SD4 dalam 'opening speech' dan juga dibuat summary daripada statement of claim. SD1 gagal untuk kemukakan nota summary yang asal bagi menunjukkan apa yang dicatit adalah contemporaneous.
>
> Lagi pun pada pendapat saya report yang dibuat itu bukan 'fair and accurate' …
>
> (… From the evidence available it is clear that what was published in C1 was only a part. This was admitted by defendant 1 herself that she made the report based on what supposedly was said by SD4 in the opening speech and what was made a summary of from the Statement of Claim. SD1 failed to tender the original summary notes to show that what was noted down was contemporaneous.
>
> Moreover in my opinion the report that was made was not fair and accurate …)

[8] There was no clear and express answer and finding that the report was not of what transpired during the proceedings. The answer given was that it was clear from the evidence that what was published in the report was a part only (adalah sebahagian sahaja). What could that mean? Could it mean a finding that only a part of the report was of what transpired in court? But which part was it? It could not be the reference

to the statement of claim allegedly made by the trial judge, because a finding had already been made that the reporter's evidence to that effect was unfounded. It could not be the opening speech, because there had already been an expression of inability to accept that there was an opening speech.

[9] There then followed, as may be seen from the passage quoted, the learned trial judge's opinion that the report was not a fair and accurate report. At p 21 he said that it was clear that the report was not accurate. And at p 23 he stated his opinion to the effect that the defence of absolute privilege under s 11 failed because the report failed to satisfy the requirement of the section that it be fair, accurate and contemporaneous, that is to say, failed to qualify as to quality. The reasons for the finding need not be stated here because the correctness or otherwise of the finding is not in issue in the present motion.

[10] The fact that the learned trial judge made that finding could be an indication that the learned trial judge found in his mind that the report was 'of proceedings publicly heard' before the High Court on 11 September 1991, because if he had found otherwise the defence of absolute privilege would have already failed without there being a need to find whether the report was fair, accurate and contemporaneous. On the other hand it could have been an 'in any event' finding which served to deprive the defendants of the defence of absolute privilege even be it assumed, the learned trial judge being uncertain whether it was so, that the report was 'of proceedings publicly heard' before the High Court on that day.

[11] The High Court awarded the plaintiff RM300,000 as compensatory damages, RM50,000 as aggravated damages, and interest at 8% per annum from the date of judgment. The defendants appealed to the Court of Appeal against the finding of liability and as regards quantum. The plaintiff appealed as regards quantum and interest.

THE COURT OF APPEAL JUDGMENT

[12] The judgment of the Court of Appeal (Mokhtar Sidin, Arifin Zakaria, Rahmah Hussain JJCA), written by Arifin Zakaria JCA (now FCJ), was delivered on 1 August 2003. In para 4 he said, without discriminating between the subject and the quality of the report, that the learned trial judge 'came to the finding that the [defendants] failed to prove that the report was a fair and a contemporaneous report of the proceedings publicly heard before a court' and in para 11 he said, again without so discriminating, that the critical issue in the appeal was 'whether the impugned report was a fair and accurate and contemporaneous report of the proceedings that had taken place in the open court on 11 September 1991' and forthwith posed the question: 'Firstly, can the report be considered as contemporaneous?'. He gave the answer at the end of para 11, after considering the meaning of 'contemporaneously', that 'the report would certainly pass the test of contemporaneity as explained above'. The question of contemporaneity having been disposed of, he said in para 12 that the next issue was whether the report could be regarded as 'a fair and accurate report of proceedings publicly heard before a court'. The issue being put that way, one would have thought that he was going to consider

the question whether, although the report was contemporaneous, it was also fair and accurate, which Wan Adnan J had answered to the contrary. But it was not so, because Arifin Zakaria JCA went on directly to say: *The point in contention here is whether the report should only be confined to what was publicly heard in open court and not to matters contained in documents filed in court, and not read in open court*. What he was going to consider was the question whether the report was 'of proceedings publicly heard before any court', that is to say, whether it qualified as to subject.

[13] On that question, Arifin Zakaria JCA said, in para 15:

> Based on the above it is clear that the statement as contained in the impugned report could only have been derived from the amended statement of claim filed in the court which was admittedly made available to the first [defendant] by Mr Karpal Singh.

[14] In para 16 he expressed the Court of Appeal's opinion that the finding of the learned trial judge 'that the impugned report was primarily based on the amended statement of claim rather than on what had taken place in the open court', which finding we have not been able to notice, was fully supported by the evidence before him. And in para 17, he expressed the Court of Appeal's conclusion 'that the publication by the [defendants] of part of the amended statement of claim which has not been read out in open court is not within the scope of the protection given by s 11(1) of the Act'. The Court of Appeal therefore affirmed the High Court's finding as regards liability. The affirmation was made on the basis that the High Court's finding was that the report did not qualify as to its subject for absolute privilege. The Court of Appeal did not come to any conclusion as regards the quality of the report, that is, whether it was a fair and accurate report, which Wan Adnan J had found was not. With their conclusion as to the subject of the report, it was not necessary for the question of liability for the Court of Appeal to arrive at a conclusion as to the quality of the report. But the High Court's finding as to the quality of the report, that it was not a fair and accurate report, remained intact and undisturbed at the Court of Appeal stage.

[15] The Court of Appeal dismissed the defendants' appeal as regards liability but allowed their appeal as regards quantum by reducing compensatory damages from RM300,000 to RM100,000 and setting aside the award of aggravated damages of RM50,000. The plaintiff's appeal as regards quantum was consequently dismissed, but his appeal as regards interest was allowed by allowing interest to be from the date of publication of the report.

[16] On 3 March 2007 this court dismissed the plaintiff's application for leave to appeal to it but allowed the defendants' application for leave to appeal to it on the following question:

> Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should be read out in the course of the proceedings before publication can be made of the pleadings.

[17] Although the question as framed presupposed 'a fair and accurate report', that is a report that qualifies as to quality, the target of the question was the subject of the report. Even the defendants accept that it was so when in para 10 of their written submission dated 9 October 2006 for this motion they say that the question as framed was obviously in response to the observations made in the judgment of the Court of Appeal when dismissing the defendants' appeal on the issue of liability', which observations are set out in that paragraph and are the observations and findings in paras 15, 16 and 17 of the Court of Appeal judgment that we have set out earlier, namely, findings as to the subject of the report, that is to say, that the report was not 'of proceedings publicly heard' before a court. As for the presupposition of a fair and accurate report, that is to say, of the quality of the report, we have already observed that at the stage of the Court of Appeal the finding of the High Court that the report in this case was not a fair and accurate report remained intact and undisturbed.

[18] Going by the way in which the question was framed, an answer on the question of subject of the report that might be given in favour of the defendants could be that a *report of proceedings publicly heard before any court* includes, for the purposes of s 11(1), a report of an extract of the pleadings for such proceedings, even though the extract was not read out in the course of the proceedings, and such a report therefore qualifies for absolute privilege. But even if the question were answered by this court in that or a similar manner in favour of the defendants, they would still, in order for the report to enjoy the immunity given by s 11(1), have to have an answer in their favour on the question of the quality of the report, in face of the answer given against them by the High Court, which was not disturbed by the Court of Appeal.

THIS COURT'S JUDGMENT

[19] The judgment of this court (Abdul Malek Ahmad PCA, Steve Shim CJ (Sabah and Sarawak), Siti Norma Yaakob FCJ) was written by Abdul Malek Ahmad PCA and was read out by the Deputy Registrar on the morning of 13 May 2005.

[20] In paras 17, 18 and 19 of the judgment Abdul Malek Ahmad PCA said as follows:

> 17 The real issue in this case is whether the report published by the [defendants] was a fair and accurate and contemporaneous report of the proceedings heard before the High Court at Penang on 11 September 1991. The crucial words of s 11(1) of the Act are the opening words, that is, 'A fair and accurate and contemporaneous report …' and not the words 'publicly heard'. Only reports that are fair and accurate and contemporaneous are absolutely privileged. Not all reports of proceedings publicly heard would be absolutely privileged. In other words, the defence of absolute privilege would be available only if a report of proceedings publicly heard is fair and accurate and contemporaneous.
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> 18 Applying this test to the facts of this case, it is clear from the submissions of the [plaintiff] that regardless of where the source for the report was from, whether it was from the amended statement of claim or from the notes of the witnesses' testimony, the report published by the [defendants] was clearly an unfair and inaccurate report of the proceedings held on 11 September 1991. Consequently he maintained that the Court of Appeal was

right to dismiss the appeal on the issue of defamation. Since leave to cross-appeal was dismissed, he reiterated that the judgment of the Court of Appeal must be wholly upheld.

19 In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, this court held that even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent findings of fact made by the High Court and the Court of Appeal since it is trite that the appellate court is not prepared to interfere with the concurrent findings of fact made by the courts below (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 at p 523). Therefore, in the final analysis and following the natural order of things, the fact remains that the [defendants] should be held liable for libel and in the premises, the appeal by the [defendants] should be dismissed with costs.

[21] It is clear from para 17 that Abdul Malek Ahmad PCA placed importance on the quality of a report, that is, on its being fair, accurate and contemporaneous. The emphasis he placed on the quality of the report might in some measure have been influenced by what he said in para 18 the [plaintiff's] submission to be, namely, that in this case, irrespective of the question of the subject of the report, the report was 'an unfair and inaccurate report'. In para 19 Abdul Malek Ahmad PCA spoke of the concurrent findings of fact made by the High Court and the Court of Appeal and of there being 'no room for this court to reverse the concurrent findings of fact'. In view of what had been said in paras 17 and 18, the concurrent findings that were intended must have been the finding of the High Court that the report was not a fair and accurate report which was seen to be also the finding of the Court of Appeal, which, as has been shown, was not so. The last sentence of para 19 expressed the conclusion that the defendants' appeal should be dismissed, which was the natural consequence of the fact that the report was not a fair and accurate report and therefore did not qualify for absolute privilege under s 11(1).

[22] The appeal panel of this court nevertheless considered it necessary to consider the question posed, which was a question as to the subject of the report. This may be seen in the first two sentences of the paragraph following, para 20: 'However, it is still necessary to answer the question posed to this court. In *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, it was held that since leave to appeal was granted, this court ought to consider and answer the question posed at the leave stage'. It would be fair to conclude from the manner in which those two sentences were worded that the answer to the question posed was not for deciding the appeal, the decision on which had already been indicated in the last sentence of para 19, but was only for the academic purpose of laying down the law for the future. A number of authorities were considered in paras 21 to 33 in order to answer the question posed. The question was answered in para 34, in favour of the [defendants] in the following words:

34 Having considered the authorities and the arguments, we are of the view that a report of the proceedings publicly heard before the High Court may include an extract of the

> pleadings and it is not necessary that the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings. Thus, our opinion is that, we would answer the first part of the question in the positive and the second part of the question in the negative, but we must reiterate that the essence of s 11(1) of the Act is whether the report published is a fair and accurate and contemporaneous report of the proceedings.

[23] It is to be observed that notwithstanding the answer to the question as to the subject of the report, emphasis was still placed on the quality of the report as the essential requirement of s 11(1). This emphasis was repeated in para 35:

> 35. Having answered the question in that manner, we would add that it is possible to publish a fair and accurate and contemporaneous report with or without including an extract of the pleadings. The ultimate question is whether the report is a fair and accurate and contemporaneous one and in this regard, s 11(1) of the Act is abundantly clear in statutorily declaring that a fair and accurate and contemporaneous report of court proceedings shall enjoy absolute privilege against an action for defamation.

[24] Then, as though the answer to the question as to the subject of the report was decisive of the appeal and the quality of the report was not important and there had been no finding of fact that the report was not a fair and accurate report, the judgment concluded in para 36 with the words: *The appeal is accordingly allowed and the order of the Court of Appeal is set aside*. That conclusion was against the tenor of the whole judgment and particularly conflicted with the conclusion in the last sentence of para 19.

[25] At 4pm of the day on which the judgment was read out, the Deputy Registrar telephoned the plaintiff, who had acted in person in the appeal in this court, and informed him that Abdul Malek Ahmad PCA had made two amendments to the judgment that had been read out. One amendment was the deletion of that last sentence of para 19. The other amendment was to include in para 36 the setting aside of the orders of the High Court.

[26] The amendment did not affect the ultimate decision in para 36 that the appeal be allowed. The deletion of the last sentence of para 19 was undoubtedly to remove the conclusion in it that conflicted with the ultimate decision. The deletion of that sentence, however, still leaves the ultimate decision going against the tenor of the whole remainder of the judgment, with its emphasis on how important it is that the report be a fair, accurate and contemporaneous report, particularly the recognition in para 19 that the High court and the Court of Appeal had made concurrent findings of fact which could not be reversed and which, as we have stated, must have been intended to refer to the finding, made by the High Court only and undisturbed by the Court of Appeal, that the report was not a fair and accurate report.

[27] The plaintiff, who also, like Abdul Malek Ahmad PCA, perceived that the High Court and the Court of Appeal had made concurrent findings that the report

was not a fair and accurate report, is therefore justified in complaining in para 26 of his affidavit dated 8 June 2005 as follows: A

> 26 Therefore, when the learned PCA allowed the appeal with costs, it is contradictory with his earlier findings that the report is not a fair and accurate report. The question framed by Court has no relevance with the concurrent finding of the High Court and the Court of Appeal. B

[28] The defendants' only reply to this grievance is in the third paragraph of para 4(x) of their affidavit dated 24 May 2006, and is to the effect that the concurrent findings of the High Court and the Court of Appeal were only in respect of the subject of the report. As has been shown, the fact is that the High Court did make C a finding that the report was not a fair and accurate report, which finding remained intact and undisturbed at the Court of Appeal stage. If the appeal panel of this court had found, as apparently they did, that the High Court and the Court of Appeal had made concurrent findings that the report was not a fair and accurate report which could not be disturbed, it should follow that the appeal be dismissed, and it is D manifestly unjust that the appeal was allowed merely on the finding in favour of the defendants as to the subject of the report.

[29] The circumstances of this case, therefore, warrant a rehearing of the appeal for the purpose of reconsidering whether there had been concurrent findings by the High E Court and the Court of Appeal that the report was not a fair and accurate report, or whether there had been a finding by the High Court only to that effect which, however, remained intact and undisturbed at the Court of Appeal stage, and if there had been such concurrent findings, or such a finding by the High Court only, what their effect is on the appeal. This conclusion is the outcome of the views that we have formed of the judgments of the High Court, of the Court of Appeal and of this court F in this case. For the rehearing to be meaningful, it is important that it be conducted on the basis that the views expressed in this judgment are not the ultimate views of this court. The ultimate views will be those of the panel rehearing the appeal, formed after hearing the submissions or arguments of the parties.

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[30] We have, by all the foregoing, in effect already undertaken a review of the decision of this court of 13 May 2005. It reveals that the decision was, on the face of it, an unjust decision. Apart from its being the course that the plaintiff himself seeks, a rehearing of the appeal is necessary as the outcome of the review, so that there may be made, by submission and argument, an examination — one that is fuller than H what has taken place on the hearing of this motion — of the area from which we perceive the apparent injustice to have arisen, and so that, according to the ultimate finding of this court on such examination, a decision will be made on the appeal, whether it be for or against the plaintiff, that will not appear to be unjust.

[31] We accordingly allow this motion by setting aside the orders of this court I made on 13 May 2005 and ordering that the defendants' appeal be reheard, for the

aforesaid purpose, by another panel of this court constituted for the purpose. The costs of this motion shall follow the outcome of the rehearing.

Motion allowed.

Reported by Loo Lai Mee